



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
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Steven L. Beshear
Governor

Jonathan Miller
Secretary

November 10, 2010

No. 10-26

Julio Ramirez, M.D.
Chief, Division of Infectious Disease
Department of Medicine
University of Louisville
530 South Jackson Street
Louisville, KY 40202

RE: Determination of Protest: RFP 728 1000000365 (HIV/AIDS Care Coordinator Program).

Dear Dr. Ramirez:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of the University of Louisville ("UL") relating to RFP 728 1000000365 for HIV/AIDS Care Coordinator Program (the "RFP").

FACTUAL BACKGROUND

The Cabinet For Health and Family Services, Department of Public Health, on behalf of the Division of Epidemiology and Health Planning issued the RFP on June 1, 2010. The RFP sought professional services from a qualified agency or organization to provide assistance for Kentucky Direct HIV/AIDS services through the Kentucky HIV/AIDS Care Coordinator Program ("CCP") in areas designated as the Louisville Region, the Purchase Region, and the Barren River Region. RFP, Section 1. During the RFP process, the RFP provided:

The Contract Specialist named below shall be the **sole point of contact throughout the procurement process.** All communications, oral and written (regular mail, express mail, electronic mail, or fax), concerning this procurement shall be addressed to:

Felicia Biggerstaff, CPPB
502 / 564-6663 ext. 3905
Fax — 502 / 564-0919
E-mail — Felicia.biggerstaff@ky.gov

From the issue date of this RFP until a Contractor(s) is selected and the selection is announced, Offerors are not allowed to communicate with any Commonwealth Staff concerning this RFP except:

- (a) The Contract Specialist cited in this RFP; or
- (b) Via written questions submitted to the Contract Specialist

The Commonwealth reserves the right to reject the proposal response for any violation of this provision.

RFP, Section 1.02 (Emphasis in original).

Further, the RFP stated:

Notice to Vendors:

All bidders are cautioned to be aware of the security in the **CHR Building** located at **275 East Main Street, Frankfort, KY**. All bid/proposal deliveries shall be time-stamped in the Department for Public Health no later than the due date and time defined in this Solicitation. In-person or courier delivered bids/proposals in response to this Solicitation should be delivered a minimum of thirty minutes to an hour earlier than the published closing time to allow for a security check-in and delivery to **First Floor, Location HS1WC**. **Delays due to building security checks shall not be justification for acceptance of a late bid or proposal.** Vendor attention to this advisory is encouraged.

RFP, Section 1.06 (Emphasis in original).

UL hand delivered its proposal for the Louisville Region on June 7, 2010, to building security desk where it was logged in by CHFS personnel. The RFP closed on June 8, 2010. On July, 7 a representative of UL e-mailed to the designated CFHS Contract Specialist:

Felicia- can you please let me know when UL might expect to receive any response from our application for the Ky CCP? We would love to see our scores and comments. We are assuming we did not get the contract but have not heard anything officially.

The designated CFHS Contract Specialist responded:

The proposal did not get evaluated as it was received after the deadline.

UL replied that same day:

We hand delivered it the day before it was due...

That afternoon, the designated CFHS Contract Specialist responded:

Thank you for bringing this to my attention. You are exactly right. In reviewing the log I discovered that your bid was submitted on time. Therefore, we will evaluate your bid as all other bids were evaluated and will be scored by the same team of evaluators. The contract has not been completed. I apologize for any inconvenience and again I appreciate you bringing this to my attention.

On August 2, the Branch Manager of the Contracts & Payments Branch of the Kentucky Department for Public Health notified UL that:

I regret to inform you that the Louisville Region CCP contract was awarded to another vendor. As you are aware, an irregularity occurred during this RFP process, this was reviewed and documented. Due to the critical nature of the services being provided under this contract and the timing of the discovery of the irregularity, the Department for Public Health in consultation with the Cabinet for Family Services determined that it was necessary to continue with the awarding of the contract to the selected vendor as this was the only way to ensure there was not a gap in services to this vulnerable population. These services are a life safety issue for many of the clients.

On August 5, 2010, CHFS awarded a contract for the Louisville Region 1 Volunteers of America ("VOA"). On August 16, 2010, UL filed its written protest. .

In its written protest, UL raised ten objections: (1) failure of the state to review our proposal as promised; (2) late release of RFP compared to notification and start date of project; (3) changes to RFP release date; (4) failure to honor commitment in e-mail to UL about the RFP release; (5) time allowed to respond to the RFP; (6) failure to extend VOA's current contract to allow UL's proposal review; (7) non-competitive contract extensions; (8) failure of state to respond to questions by the deadline stated in the RFP; (9) confidentiality of budget information and unfair advantage realized by VOA; and (10) review committee's knowledge of UL's proposal. On August 31, 2010, VOA submitted a written response to the protest. On September 13, 2010, CHFS responded to the protest.

With respect to UL's first ground of protest, that is, that UL's timely proposal was not evaluated, CHFS stated:

Section 1.06 of the Request for Proposal advises that all in-person or courier delivered proposals should be delivered a minimum of thirty minutes to an hour earlier than the published closing time to allow for a security check-in and delivery to First Floor, Location HS1WC. UL Wings apparently hand delivered their proposal, but they left it at the CHR building security desk, not the location set forth in the RFP. While the security staff delivered the proposal to the Department for Public Health on June 7, 2010, the Department for Public Health staff did not recognize the envelope as a proposal for RFP 728 1000000365. The UL Wings proposal was mistaken for a response to a different RFP that had closed and was labeled as a late response.

Upon UL Wing's inquiry on July 7, 2010, the department discovered our error. At that point, however, the contract was already drafted, though not in final status in eMARS. Moreover, the department had notified the successful offeror of their intent to award the contract. Due to the critical nature of the services, which are to assist Kentuckians living with the HIV disease in locating and accessing medical care, housing, counseling, Medicaid, Social Security Disability, transportation and legal services, the department could not impede services to the Kentucky clients by delaying the start of the contract and had, therefore, authorized the successful offer (also the incumbent) to provide the services.

For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, and other relevant information, the Secretary finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. UL submitted a proposal in response to the RFP. Therefore, UL has standing to protest the award of the RFP.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise thereto. KRS 45A.285(2). Here, CHFS notified UL on August 2, 2010, that it had not been awarded the contract. The protest was received on August 16, 2010. The protest was filed within two calendar weeks and is, accordingly, timely.

Commonwealth procurement is governed by the Kentucky Model Procurement Code ("KMPC") located in KRS Chapter 45A. One of the express purposes of the KMPC is "[t]o insure the fair and equitable treatment of all persons who deal with the procurement system of the Commonwealth." KRS 45A.010(2)(e). Further, the requirements of the KMPC are to be performed in "good faith." KRS 45A.015 (2).

This RFP was for a "Personal Service Contract." KRS 45A.695. A Personal Service Contract ("PSC") is a contract by which an individual or entity "is to perform certain services requiring professional skill or

professional judgment for a specified period of time at a price agreed upon.” KRS 45A.690 (1)(f). An award of a PSC is to be made to the “best qualified of all offerors based on the evaluation factors set forth in the request for proposals and the negotiation of fair and reasonable compensation.” KRS 45A.695(5).

A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. See 4 C.F.R §21.2(a)(1) (“Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals.”); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD ¶ 431 (“a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency’s statement of the terms and conditions.”); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (federal statutes and decisions to be persuasive in the procurement context).

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

UL’s grounds for protest Nos. 1, 6, and 10 relate to the same issue, that is, the failure of CHFS to review its proposal. UL’s remaining grounds of protest (Nos. 2-5, 7-9) relate to the form of the RFP or to the RFP process and have been waived by UL’s submission of its proposal. See 4 C.F.R §21.2(a)(1); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD ¶ 431.

UL’s primary ground of protest (Nos. 1, 6, 10) is that its proposal was timely submitted and was not scored by CHFS as promised. This protest raises three issues: (1) whether UL’s submission of its proposal was timely; (2) if not, whether CHFS was required to evaluate a late-received proposal; (3) if not, whether CHFS was bound by the Contract Specialist’s promise that the proposal would be reviewed.. These three issues will be considered in turn:

1. Whether UL’s submission of its proposal was timely.

RFP, Section 1.06 provided, in part:

All bid/proposal deliveries shall be time-stamped in the Department for Public Health no later than the due date and time defined in this Solicitation. In-person or courier delivered bids/proposals in response to this Solicitation should be delivered a minimum of thirty minutes to an hour earlier than the published closing time to allow for a security check-in and delivery to **First Floor, Location HS1WC.**

Federal government procurement regulation 48 C. F. R. §15.208(a) provides:

Offerors are responsible for submitting proposals, and any revisions, and modifications, so as to reach the Government office designated in the solicitation by the time specified in the solicitation.

Further,

It is the responsibility of the offeror to deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of the proposal. [Citation omitted]. By choosing a method of delivery other than that specified in the late proposal clause (registered mail, certified mail or telegram where authorized), an offeror assumes a high degree of risk that its proposal will be rejected if untimely delivered. [Citations omitted]. The reason for the rules governing late proposals is that the manner in which the government conducts its procurements must be subject to clearly defined standards that apply equally to all offerors so that fair and impartial treatment is ensured. *Matter of: Robert R. Nathan Associates, Inc.*, 88-1 CPD ¶615 (Comp. Gen.).

Here, it is undisputed that UL's proposal was left at the security desk for the CHFS building. This was not the specific location designated by the RFP where proposals were to be received. CHFS does concede that it mishandled the proposal after it was delivered to the CHFS security desk. However, by not following the specific directions for proposal delivery of the RFP, UL bore the risk that the correct office would not receive the proposal in a timely. *Matter of: Robert R. Nathan Associates, Inc.*, 88-1 CPD ¶615 (Comp. Gen.). The Secretary finds that the UL proposal was not delivered as required by the RFP and UL bore the subsequent risk of mishandling.

2. If not, whether CHFS was required to evaluate a late-received proposal.

The RFP incorporates the Finance and Administration Cabinet's Manual of Policies and Procedures. ("FAP"). RFP, Section 4.00. FAP 110-10-00(19) provides:

LATE OFFERS AND MODIFICATIONS: The state's procurement system will not allow submission of online responses after the published date and time for bid closing. A hardcopy offer or a modification of an offer received at the office designated in the solicitation after the hour and date specified for receipt shall not be considered for an award of contract, unless:

- a. No bids are received other than the late bid; and
- b. The need of an agency is determined to preclude the re-solicitation of bids; and
- c. The offer is evaluated and found to serve the best interest of the Commonwealth.

Similarly, FAP 110-10-00(5)(1) states:

...A late bid response shall not be considered unless it is postmarked before the date specified in the Solicitation and is the only responsive bid received. A hand-

delivered bid shall not be considered unless it is delivered before the time and date specified in the Solicitation...

In this case, it is undisputed that UL's proposal was received at the CHFS building main security desk one day before proposals were due. However, UL's proposal was not the only proposal received. Accordingly, the Secretary finds that CHFS did not abuse its discretion in not reviewing UL's late-received proposal. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007); *Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174

3. If not, whether CHFS was bound by the Contract Specialist's promise that the proposal would be reviewed.

The Commonwealth government acts through its employees. Solicitations may designate specific employees as agents. RFP, Section 1.02. Here, the Contract Specialist acted as an agent of the Commonwealth with respect to the RFP. Yet, the scope of the agent's authority to bind the Commonwealth is limited. For example, an agent may not waive express requirements of the law or of the solicitation. *See Matter of: American Hospital Consultants Company*, 87-1 CPD ¶386 (Comp. Gen. 1987).

In this case, the RFP designated the Contract Specialist as an agent. RFP, Section 1.02. Further, the RFP set out specific requirements for the time for and location for the delivery of the proposals. RFP, Section 1.06. The regulations provide a basis for the evaluation of late-submitted proposals. FAP 110-10-00(19).

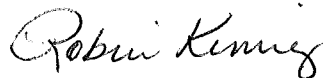
Here, UL points to the promise of the agent to evaluate its proposal. The Secretary finds that this promise was in violation of the express terms of the RFP and applicable regulations. The authority of the Contract Specialist did not include waiving express RFP terms, laws, or regulations. It is also significant that UL did not rely on this promise to its actual detriment. Even if UL had taken an action in reliance, such an action would not have been reasonable given the language of the RFP and of the regulation. Moreover, the promise was subsequently renounced by another agent of the Commonwealth.

Accordingly, upon review of the record, the protest of UL lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and UL has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation

A handwritten signature in cursive script, reading "Robin Kinney".

Robin Kinney
Executive Director
Office of Administrative Services

cc: Joan Graham, CHFS